

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>ADVANCED TUBULAR</b>	:	
<b>PRODUCTS, INC., et al.,</b>	:	
<b>Plaintiffs,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	
	:	
<b>SOLAR ATMOSPHERES, INC.,</b>	:	<b>No. 03-0946</b>
<b>Defendant.</b>	:	

**MEMORANDUM AND ORDER**

**Schiller, J.**

**March 12, 2004**

Plaintiff Advanced Tubular Products, Inc. (“ATP”) brings this action alleging breach of contract and fraudulent misrepresentation against Defendant Solar Atmospheres, Inc. (“Solar”).<sup>1</sup> Presently before the Court is Plaintiff ATP’s motion for partial summary judgment and Defendant Solar’s motion for summary judgment. For the reasons stated below, I deny Plaintiff’s motion and grant Defendant’s motion.

**I. BACKGROUND**

Plaintiff ATP, a Kentucky corporation, was created when investors Richard Bitterman, Ralph Margulis, and Adam Clifton purchased a tube manufacturing business named MascoTech in 1999. (Bitterman Dep. at 14-17, 37-38.) Mr. Bitterman, President and Chief Executive Officer of ATP, ran the company along with the other investors. ATP was a “start-up” company struggling for sales. (*Id.* at 36 – 37, 57). Although the bulk of ATP’s business was derived from the automotive industry, the company also supplied its products to other miscellaneous industries. (*Id.*) In late 2000 or early

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<sup>1</sup> Plaintiffs Alternative Tubular Products, Inc., Ralph Margulis, Adam Clifton, and Richard Bitterman also brought claims against Solar but have since voluntarily dismissed them with prejudice.

2001, ATP's management decided to expand by selling stainless steel tubing to the oil and gas industry. (Bitterman Dep. at 37-39.) In order to expand into this industry, ATP contacted several heat treaters, including Solar, regarding heat treatment of ATP's stainless steel tubing. (*Id.* at 51-54; Hill Dep. at 46-7.) Because Bitterman had been informed that Solar "seemed to be a decent heat treater [with] some experience in aerospace [indicating] that they might be able to handle a demanding heat treat application," he visited Solar's Souderton, Pennsylvania facility in early 2001 in order to confirm whether Solar could perform the work. (Bitterman Dep. at 54-55, 119-120.)

At the meeting at Solar's Souderton facility, Bitterman met with Phil DeHennis, the Vice President of Operations at Solar, and discussed the demands of the particular heat treatment application needed for the job, which included the specification standard known as ASTM A789. (Bitterman Dep. at 82, 92, 121, 122, 155, 158.) In addition, Bitterman gave Robert Hill, Solar's Vice President of Heat Treating Operations at the Souderton facility, a description of this specification from an industry handbook. (Hill Dep. at 27.) Solar's representatives responded that "they were familiar with [ASTM A789] and they felt that they could handle it." (Bitterman Dep. at 124.)

On February 19, 2001, ATP sent three sample coils of tubing to Solar for testing as part of the "qualification process" to assure ATP that Solar could treat the tubing as required. (Bitterman Dep. at 62-65; Def's Resp. to Pl.'s Mot. for Partial Summ. J., Ex. A.) Solar heat-treated these sample coils on February 25 and 27, 2001 and sent them back to ATP for testing. (Def.'s Resp. to Pl.'s Mot. for Partial Summ. J., Ex. B, C.) In the interim, on February 20, 2001, Solar faxed a quotation for its services and then mailed the hard copy of the quotation with its Terms of Sale to ATP.<sup>2</sup> (Way Dep. at 36-37.) The first faxed quotation sent to ATP included the hourly service

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<sup>2</sup> Ms. Sharleen Way, Solar's Purchasing Assistant, testified at her deposition that it was the regular practice of Solar to first fax the quotation to the potential customer and then to mail

charges and the following language: “This quotation is subject to Solar Atmospheres, Inc. Terms of Sale as presented on form SA-1 (01-00).” Additionally, the quote specified:

It is the customer’s responsibility to notify Solar Atmospheres, Inc. in writing on your purchase order, if additional parcel or carrier insurance is required above the standard limit. Please reference our quote number on your purchase order. *Quotation subject to Solar Atmospheres’ limited liability statement.* All freight shipments must be prepaid by customers.

(Def.’s Mot. for Summ. J., Ex. B (emphasis added).) The terms of sale on form SA-1 (01-00) that were mailed to ATP provided in pertinent part:

**2. Quotations**

Unless otherwise previously withdrawn, SELLER’s QUOTATION is open for acceptance within the period stated therein or when no period is stated, within 30 days from the date of SELLER’s QUOTATION. . . .

**12. Limited Warranty – Limitation Of Liability And Remedies**

**12.1 SERVICE Provided For BUYER Owned Material**

IT IS RECOGNIZED THAT EVEN AFTER EMPLOYING ALL THE SCIENTIFIC METHODS KNOWN TO SELLER, HAZARDS STILL REMAIN IN PROVIDING PROCESS SERVICES. THEREFORE, SELLER’S LIABILITY SHALL NOT EXCEED TWICE THE AMOUNT OF SELLER’S CHARGES FOR SERVICES PERFORMED ON ANY MATERIAL (FIRST TO REIMBURSE FOR THE CHARGES AND SECOND TO COMPENSATE IN THE AMOUNT OF THE CHARGES), EXCEPT BY WRITTEN AGREEMENT SIGNED BY AN OFFICER OF SELLER. BUYER, BY CONTRACTING FOR SERVICES, AGREES TO ACCEPT THE LIMITS OF LIABILITY AS EXPRESSED IN THIS STATEMENT TO THE EXCLUSION OF ANY AND ALL PROVISIONS REGARDING STATEMENTS OF

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the hard copy of the quotation with a copy of Solar’s Terms of Sale because the faxed copies of the Terms of Sale were often illegible. (Way Dep. at 21-22.)

LIABILITY ON THE BUYER'S OWN INVOICES, PURCHASE ORDERS AND / OR OTHER DOCUMENTS. IF BUYER DESIRES OTHER TERMS OF LIABILITY TO BE IN FORCE AND EFFECT, THE OTHER TERMS OF LIABILITY MUST BE AGREED TO IN WRITING AND SIGNED BY AN OFFICER OF SELLER. IN SUCH EVENT, A DIFFERENT CHARGE FOR SELLER'S SERVICES, REFLECTING THE HIGHER RISK TO SELLER, SHALL BE AGREED TO BY THE BUYER AND SELLER. NO CLAIMS WILL BE ALLOWED FOR SHRINKAGE, EXPANSION, DEFORMITY, RUPTURE AND / OR ANY OTHER PHYSICAL CHANGE OF THE MATERIAL RESULTING FROM SERVICES PROVIDED BY SELLER, EXCEPT BY PRIOR WRITTEN AGREEMENT. WHENEVER BUYER SUPPLIES MATERIAL TO SELLER WITH DETAILED INSTRUCTIONS SPECIFYING THE SERVICE PROCESS, SELLER'S RESPONSIBILITY SHALL END WITH THE CARRYING OUT OF THOSE INSTRUCTIONS. FAILURE BY THE BUYER TO SPECIFY PLAINLY AND CORRECTLY THE KIND OF MATERIAL TO BE PROCESSED (SERVICED), SHALL CAUSE AN EXTRA CHARGE TO BE MADE TO COVER ANY ADDITIONAL EXPENSES INCURRED AS A RESULT THEREOF, BUT SHALL NOT CHANGE THE LIMITATION OF LIABILITY STATED ABOVE.

#### **12.2 Warranty Liability Limitations**

EXCEPT FOR THE EXPRESS WARRANTY STATED ABOVE, SELLER DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND DISCLAIMS ALL WARRANTIES FOR TRADE OR SAMPLES PREVIOUSLY SUPPLIED. THE STATED WARRANTY AND REMEDY PROVIDED ARE IN LIEU OF OTHER POSSIBLE LIABILITY AND DAMAGES AGAINST SELLER AND IN NO EVENT SHALL SELLER BE LIABLE FOR SPECIAL, INDIRECT OR CONSEQUENTIAL DAMAGES RESULTING FROM THE BREACH OF THIS WARRANTY OR ANY OTHER PROVISION OF THESE TERMS AND CONDITIONS, THE QUOTATION, THE PURCHASE ORDER AND / OR ANY AGREEMENT BETWEEN BUYER AND SELLER OR OTHERWISE ARISING OUT OF OR IN CONNECTION WITH THE SERVICES AND / OR GOODS OR THEIR SALE, DELIVERY, DISTRIBUTION, INSTALLATION, MAINTENANCE, OPERATION, SERVICE, PERFORMANCE OR

USE, INCLUDING, WITHOUT LIMITATION, ANY LOSS OF USE, LOST REVENUES, LOST PROFITS, DAMAGE TO ASSOCIATED EQUIPMENT OR TO FACILITIES, LOST DATA, COSTS OF SUBSTITUTED GOODS, EQUIPMENT FACILITIES OR SERVICES, AND ANY SIMILAR OR DISSIMILAR LOSSES, COSTS OR DAMAGES, WHETHER BASED ON WARRANTY, CONTRACT, STRICT LIABILITY OR NEGLIGENCE. IN NO EVENT SHALL THE LIABILITY OF SELLER EXCEED TWO (2) TIMES THE CHARGES FOR PROVIDING SERVICES FOR BUYER OWNED MATERIAL, OR THE ACTUAL COST OF CORRECTING DEFECTS IN MANUFACTURED PRODUCTS, WHICHEVER IS LESS.

(Terms of Sale, Form SA-1(01-00), Def.'s Mot. for Summ. J., Ex. C.) On February 26, 2001, Solar sent a revised quotation and the same Terms of Sale to ATP. (Def.'s Resp. to Pl.'s Mot. for Partial Summ. J., Ex. F.) ATP received the Terms of Sale at some point in February 2001, as Mr. Bitterman admitted that he saw "at least some of the terms and conditions." (Bitterman Dep. at 152.)

Because the first three sample coils stuck together after being heat-treated, ATP sent two additional sample coils on February 28, which Solar treated and returned to ATP on March 5. (Def.'s Resp. to Pl.'s Mot. for Partial Summ. J., Ex. J, K; Hill Dep. at 71.) After performing several tests for "sigmaphase," also known as improper heat treatment, on the second set of sample coils, ATP was satisfied that Solar was capable of doing the work and shipped the last of the coil samples. Solar treated these coils and sent them back to ATP on March 13. (Bitterman Dep. at 64-5; Def.'s Resp. to Pl.'s Mot. for Partial Summ. J., Ex. L.) The qualification process ended on March 19, 2001, when ATP shipped 17 coils, omitting the "sample" description on the packing slip. (Def.'s Resp. to Pl.'s Mot. for Partial Summ. J., Ex. N.) Between March 19 and April 18, ATP sent several large lots of coils that Solar processed and either returned to ATP or sent directly to ATP's orbital welder in Texas. (*Id.*, Ex. J, K, N, O, P.)

After these services were provided by Solar, ATP sold the heat-treated tubing to Tubeco, Inc., who in turn sold it to a contractor in Texas, where the tubes were eventually used in underground oil and gas wells to, among other things, break down rock with corrosive acid. (Bitterman Dep. at 80). Some time after the services were performed on the tubing, ATP was informed by the ultimate purchaser that the tubing was brittle and failed as a result of improper heat treatment or “sigmaphase.” (*Id.* at 190–91.)

As a result of this product failure, Plaintiff brought suit against Defendant alleging breach of oral contract and fraudulent misrepresentation arising out of the services provided by Defendant. Defendant filed a motion to dismiss asserting, *inter alia*, that the applicable contract between the parties included a limited liability clause that limited Plaintiffs’ claims to an amount under \$75,000.00, thereby divesting this Court of subject matter jurisdiction. On September 24, 2003, this Court denied the motion to dismiss without prejudice to Defendant raising these arguments again at summary judgment because factual issues required consideration outside the pleadings and further discovery was needed. Limited discovery regarding the formation of the contract was taken. Plaintiff now moves the Court for partial summary judgment on the contract claim, arguing that the limited liability provision is not part of the contract formed between the parties. Defendant also moves for summary judgment, asserting that: (1) the limited liability clause applies; (2) Plaintiff’s fraud claim should be barred by the limited liability clause pursuant to Pennsylvania’s gist of the action theory; and (3) as a result, the Court should dismiss this case for lack of subject matter jurisdiction. For the reasons set forth below, Defendant’s motion is granted and Plaintiff’s partial motion for summary judgment is denied.

## II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” FED. R. CIV. P. 56(c). A genuine issue of material fact exists if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party bears the initial burden of identifying those portions of the record that it believes illustrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Where the non-moving party has the burden of proof on a particular issue at trial, the moving party meets its burden by “pointing out to the district court that there is an absence of evidence to support the non-moving party’s case.” *Id.* at 325. Once the moving party meets this burden, the non-moving party must offer admissible evidence that establishes a genuine issue of material fact that should proceed to trial. *See id.* at 324; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). In order to meet this burden, the opposing party must point to specific, affirmative evidence in the record and not simply rely on mere allegations, conclusory or vague statements, or general denials in the pleadings. *See Celotex*, 477 U.S. at 324. “Such affirmative evidence—regardless of whether it is direct or circumstantial—must amount to more than a scintilla, but may amount to less (in the evaluation of the court) than a preponderance.” *Williams v. Borough of West Chester*, 891 F.2d 458, 460-61 (3d Cir. 1989).

A court may grant summary judgment if the non-moving party fails to make a factual showing “sufficient to establish an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322. In making this determination, the non-

moving party is entitled to all reasonable inferences. *See Pollock v. Am. Tel. & Tel. Long Lines*, 794 F.2d 860, 864 (3d Cir. 1986). A court may not, however, make credibility determinations or weigh the evidence in making its determination. *See Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000); *see also Goodman v. Pa. Tpk. Comm’n*, 293 F.3d 655, 665 (3d Cir. 2002).

### **III. DISCUSSION**

#### **A. The Limitation of Liability Clause is an Enforceable Part of the Contract**

The parties do not dispute that a contractual agreement existed; rather the issue in dispute is whether the limitation of liability clause was a term of the contract. Under Pennsylvania law, limitation of liability clauses are routinely enforced in contracts negotiated between sophisticated parties when the nature of the loss is commercial.<sup>3</sup> *Valhal Corp. v. Sullivan Assoc., Inc.*, 44 F.3d 195, 201 (3d Cir. 1995) (discussing limitation of liability clauses under Pennsylvania law). Enforcement of such provisions is important to preserve their purpose of “allocating ‘unknown or undeterminable risks,’ and are a fact of every-day business and commercial life.” *Id.* at 204 (citations omitted). As long as the limitation is “reasonable and not so drastic as to remove the incentive to perform with due care, Pennsylvania courts uphold the limitation.” *Id.* Furthermore, these provisions are generally enforced regardless of whether the damages are pled in contract or tort. *Id.* at 201.

Additionally, “Pennsylvania law does not condition enforcement of a limitation of liability

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<sup>3</sup> Pennsylvania law applies in this case because the performance of the contract occurred in Pennsylvania. *See Standard Bent Glass Corp. v. Glassrobots OY*, 333 F.3d 440, 444 n.7 (3d Cir. 2003) (“Because performance occurred in Pennsylvania, we apply Pennsylvania law,” (citing *Knauer v. Knauer*, 470 A.2d 553, 557-58) (Pa. Super. Ct. 1983)).

provision upon any specific form of consent, and an unsigned contract can include an enforceable agreement to limit liability if both parties manifest their approval of the terms.” *Id.* “[W]hen the parties have not only completed their arrangements but have actually completed the commercial relationship involved, notwithstanding the absence of definite written terms, a trier of fact is entitled to view the entire dealing and conclude that it indicated there was a contract with terms mutually understood between the parties.” *Id.* (quoting *Caisson Corp. v. Ingersoll-Rand Co.*, 622 F.2d 672, 678 (3d. Cir. 1980)).

Furthermore, it is well-settled that a contract may incorporate by reference provisions contained in another instrument so long as the incorporated provisions are “identified beyond all reasonable doubt.” *Standard Bent Glass Corp. v. Glassrobots OY*, 333 F.3d 440, 447 n.10 (3d Cir. 2003). In the case of commercial contracts, where the goal is to “efficiently facilitate business transactions between seasoned merchants . . . [i]t is appropriate to require a merchant to exercise a level of diligence that might not be appropriate to expect of a non-merchant.” *Id.* However, a provision will not be incorporated by reference, even in a commercial transaction, if it would result in surprise or hardship to the party against whom enforcement is sought. *Id.* at 448. In order to demonstrate surprise or hardship from the inclusion of a provision by reference, the non-assenting party must show:

[B]oth a subjective element of what a party actually knew and an objective element of what a party should have known . . . A profession of surprise and raised eyebrows are not enough. Instead, to carry its burden the nonassenting party must establish that, under the circumstances, it cannot be presumed that a reasonable merchant would have consented to the additional term.

*Id.* As such, “[w]hile a party’s failure to read a duly incorporated document will not excuse the

obligation to be bound by its terms, a party will not be bound to the terms of any document unless it is clearly identified in the agreement.” *PaineWebber, Inc. v. Bybyk*, 81 F.3d 1193, 1201 (2d Cir. 1996); *see also Standard Bent Glass Corp.*, 333 F.3d at 447 n.10 (citing *PaineWebber*).

In the present case, even when the course of dealings between ATP and Solar are viewed in a light most favorable to ATP, it is clear from ATP’s conduct that it manifested its assent to the terms of sale, which were incorporated by reference on the quotations sent by Solar. ATP contends that the terms of the contract were frozen without the limited liability clause when it accepted Solar’s quote and Solar began performance. (Pl.’s Mot. for Partial Summ. J. at 4; Barndt Dep. at 48-49.) The quotation that ATP accepted, however, clearly incorporated by reference the terms of sale and specifically noted that the quotation was subject to Solar’s limited liability clause. (Def.’s Mot. for Summ. J., Ex. B.) Manifestation of the acceptance of Solar’s offer and its Terms of Sale is demonstrated by the fact that ATP repeatedly sent its tubing to Solar for heat treatment without clarification or objection to these terms. *Valhal Corp.*, 44 F.3d at 201 (holding that acceptance occurred when company reviewed proposal containing its terms and authorized offeror to proceed). In fact, the limited liability clause specifically invited ATP to negotiate a higher limit with Solar, which from the record it appears that ATP did not do.

Furthermore, Bitterman admitted that he saw “at least some of the terms of sale.” (Bitterman Dep. at 152.)<sup>4</sup> Regardless, however, ATP’s failure to read or acknowledge the limited liability clause

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<sup>4</sup> It should be noted that Bitterman’s deposition stands in contrast to his affidavit submitted in Plaintiff’s response to Defendant’s Motion to Dismiss. First, in his affidavit, Bitterman stated that during the contract negotiations, he “never saw any [terms and conditions applicable to Solar’s services] in any written document, including as part of Solar’s quotations.” (Def.’s Mot. for Summ. J., Ex. M ¶ 3.) In his deposition, however, he testified that he “[saw] at least some of the terms and conditions.” (Bitterman Dep. at 152.) The more troubling aspect of

does not excuse the obligation to be bound by it unless ATP can show surprise or hardship from its incorporation. *Standard Bent Glass Corp.*, 333 F.3d at 447 n.10; *see also Valhal Corp.* 44 F.3d at 201. Plaintiff has failed to show surprise or hardship to the limited liability clause. First, there is no evidence of surprise because Bitterman testified that he had seen at least some of the terms. *Cf. Standard Glass*, 33 F.3d 440 (holding that affidavit of president of company's stating he never received copy of terms is insufficient to demonstrate surprise). Second, there is no evidence of hardship because a limited liability clause is common place in the commercial arena. *Valhal Corp.*, 44 F.3d at 204 ("Limitation of liability clauses are a way of allocating 'unknown or undeterminable risk' . . . and are a fact of every-day business and commercial life."). This particular provision limited liability to twice the amount of the cost of the services provided under the contract and specified the reasoning behind the limitation. The provision also provided for a mechanism by which the parties could negotiate to raise the limit, and thus, the price of the services in order to share the potential risk involved. Accordingly, a reasonable merchant would have either assented to this term or negotiated the limits of the term. As such, the evidence is insufficient to prove surprise or hardship. Therefore, even when viewing the facts in a light most favorable to Plaintiff, I find, as a matter of law, that the limited liability clause was an enforceable part of the contract.

**B. The Gist of the Action Theory Bars Plaintiff's Fraud Claim**

Defendant contends that Plaintiff's fraudulent misrepresentation claim should also be barred

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Mr. Bitterman's deposition testimony is that when asked whether he read the affidavit that he signed, he responded, "I think they sent [the affidavit] to me for checking, and I guess I didn't do a very good job of checking now that I read it now." (*Id.* at 152.)

by the contract terms under the gist of the action theory.<sup>5</sup> The “gist of the action” doctrine bars a plaintiff from bringing a tort claim “when that theory is ‘merely another way of stating its breach of contract claim,’ or when its success ‘would be wholly dependent upon the terms of the contracts.’” *Sunquest Info. Sys., Inc. v. Dean Witter Reynolds, Inc.*, 40 F. Supp. 2d 644, 651 (W.D. Pa. 1999) (quoting *C.P. Cook Coal Co. v. Browning Ferris, Inc.*, Civ.A.No. 97-7085, 1995 U.S. Dist. LEXIS 5722, at \*16, 1995 WL 251341, at \*5 (E.D. Pa. Apr. 26, 1995)); *USX Corp. v. Prime Leasing, Inc.*, 988 F.2d 433, 440 (3d Cir. 1993)). “To be construed as in tort . . . the wrong ascribed to defendant must be the gist of the action, the contract being collateral.” *Etoll, Inc. v. Elias/Savion Advertising, Inc.*, 811 A.2d 10, 14 (Pa. Super. Ct. 2002). “In other words, a claim should be limited to a contract claim when the parties’ obligations are defined by the terms of the contracts, and not by the larger social policies embodied by the law of torts.” *Id.* (quoting *Bohler-Uddeholm Am., Inc., v. Ellwood Group, Inc.*, 247 F.3d 79, 104 (3rd Cir. 2001)). As such, “where the gist of the claim is that a party failed to fulfill the terms of an agreement, the aggrieved party cannot try to mask its claim as a tort claim.” *Weber Display & Packaging v. Providence Washington Ins. Co.*, No. 02-7792, 2003 U.S. Dist. LEXIS 2187, at \*8, 2003 WL 329141, at \*3 (E.D. Pa. Feb. 10, 2003) (citing *Sunquest*, 40 F. Supp. 2d at 651).

While this Court has held that the gist of the action doctrine is applicable under Pennsylvania law to fraud cases, *Weber Display & Packaging*, 2003 U.S. Dist. LEXIS, at \*9, the Pennsylvania Superior Court recently discussed the application of the gist of the action doctrine to claims for fraud

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<sup>5</sup> While Plaintiff contends that the Court should not revisit this issue as it was raised in Defendant’s Motion to Dismiss, the Court denied Defendant’s Motion without prejudice to raising the arguments at summary judgment.

in the performance of a contract versus claims for fraud in the inducement. *Etoll*, 811 A.2d at 11. That court stated: “[F]raud in the inducement of a contract would not necessarily be covered by [the gist of the action] doctrine because fraud to induce a person to enter into a contract is generally collateral to (i.e., not “interwoven” with) the terms of the contract itself.” *Id.* at 20. A breach of contract claim, however, “cannot be ‘bootstrapped’ into a fraud claim merely by adding the words ‘fraudulently induced’ or alleging the contracting parties never intended to perform.” *Galdieri v. Monsanto Co.*, 245 F. Supp. 2d 636, 651 (E.D. Pa. 2002). As such, a court must examine whether the fraud claim is actually barred by the doctrine “based on the individual circumstances and allegations of the plaintiff.” *Etoll*, 811 A.2d at 19; *see also Am. Guar. & Liab. Ins. Co. v. Fojanini*, 90 F. Supp. 2d 615, 622 (E.D. Pa. 2000) (“The test is not limited to discrete instances of conduct; rather, the test is, by its own terms, concerned with the nature of the action as a whole.”).

In its Amended Complaint, Plaintiff contends that Solar fraudulently induced Plaintiff to enter the contract by falsely representing that Solar could perform the necessary heat treatment services and that Plaintiff would not have entered into the contract if it knew the representations were false. (Am. Compl. ¶¶ 34 -39.) Viewing the present case as a whole, however, Plaintiff’s fraud claim is inextricably intertwined with its breach of contract claim. The factual allegations in Plaintiff’s Amended Complaint regarding each claim are nearly identical. Although Plaintiff attempts to style its claim as fraudulent inducement, the gravamen of why it suffered a loss stems from the allegation that “Solar failed to heat treat the tubing in compliance with ASTM A789.” (Am. Compl. ¶ 27.) ATP presented Solar with the specifications, which Solar felt it could provide, and the parties had a “qualification process” to test whether Solar could properly heat-treat ATP’s product. (Bitterman Dep. at 62-65,124.) The issue that remains is whether Solar, in fact, properly

heat-treated the remainder of the coils, which is merely a question of performance of the contract. *Weber Display & Packaging*, 2003 U.S. Dist. LEXIS 2187, at \*8. Plaintiff may not rely upon Solar's representations that it felt it could "handle" the specifications to convert this contract-based action into a claim of fraudulent inducement. *Etoll*, 811 A.2d. at 832 n.6 (stating that under Pennsylvania law, "the breach of a promise to do something in the future is not fraud . . . an unperformed promise does not give rise to a presumption that the promisor intended not to perform when the promise was made" (internal quotations omitted)). Therefore, as I conclude that the gist of Plaintiff's case is in contract, Plaintiff cannot avoid the terms of this contract, namely the limitation of liability clause, by attempting to recast the theory of its case. *Valhal Corp.*, 44 F.3d at 208-09; *Galdieri*, 2002 U.S. Dist. LEXIS 11391, at \*34.

### **C. Jurisdiction**

This Court has jurisdiction in the present case based solely on diversity of citizenship. Because I conclude that the limited liability provision applies to the contract and the gist of the action doctrine applies to Plaintiff's fraud claim, ATP's maximum possible recovery of approximately \$27,000.00 falls below the jurisdictional amount required by 28 U.S.C. § 1332. (Def.'s Resp. to Pl.'s Mot. for Partial Summ. J., Ex. L.) Therefore, this Court must dismiss this case for lack of subject matter jurisdiction. *Valhal Corp.*, 44 F.3d at 209.

## **IV. CONCLUSION**

For the foregoing reasons, Plaintiff's motion is denied and Defendant's motion is granted. An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>ADVANCED TUBULAR</b>	:	
<b>PRODUCTS, INC., et al.,</b>	:	
<b>Plaintiffs,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	
	:	
<b>SOLAR ATMOSPHERES, INC.,</b>	:	<b>No. 03-0946</b>
<b>Defendant.</b>	:	

**ORDER**

**AND NOW**, this 12<sup>th</sup> day of **March 2004**, upon consideration of Defendant Solar Atmosphere, Inc.'s Motion for Summary Judgment and Plaintiff's response thereto, Plaintiff's Motion for Partial Summary Judgment and Defendant's response thereto, and for the foregoing reasons, it is hereby **ORDERED** that:

1. Plaintiff's Motion for Partial Summary Judgment (Document No. 45) is **DENIED**.
2. Defendant's Motion for Summary Judgment (Document No. 44) is **GRANTED**.
3. This case is **DISMISSED** for lack of subject matter jurisdiction.
4. The Clerk of Court is directed to close the case for statistical purposes.

**BY THE COURT:**

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**Berle M. Schiller, J.**